UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA v. MATTHIEU SPENCER O'ROURKE, Defendant	Criminal No. 99-52-B-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

On January 18, 2000, two Motions to Suppress (Docket Nos. 13 and 14) were filed on behalf of Defendant Matthieu Spencer O'Rourke. Each Motion was filed by a different attorney, apparently because at the time the Motions were filed, Defendant was in the process of changing attorneys. The first Motion to Suppress was filed by the attorney who first represented Defendant, Charles W. Hodson, II, while the second Motion to Suppress was filed by Defendant's current attorney, Thomas J. Connolly. Because both Motions seek the same remedy based on the same legal theories, and because Attorney Connolly represented Defendant at the evidentiary hearing and filed the post-hearing brief in support of the Motion to Suppress, the Court will treat the second Motion to Suppress ("the Motion") (Docket No. 14) as the only Motion under advisement.[1]

Defendant moves to suppress two letters seized by officials at the Maine Correctional Center in Windham, Maine, where Defendant is an inmate. Additionally, Defendant seeks to suppress a statement he made to a police officer after the letters were seized. The Court

[1] Because the same legal issues are presented in both Motions, Defendant is not prejudiced by the Court's decision to treat the first Motion to Suppress (Docket No. 13) as moot.

conducted an evidentiary hearing, and Defendant and the Government filed supplemental briefs. For the reasons that follow, the Court will grant the Motion in part and deny the Motion in part.

I. FACTS

The facts revealed at the hearing are as follows. On approximately May 3, 1999, Defendant sent two letters from the Maine Correctional Center in Windham, Maine, where he was an inmate at the time. The letters were addressed to Mike Wilson in Waterville, Maine. The United States Postal Service was unable to deliver the letters and the letters were returned to sender. The returned letters were received by officials at the Maine Correctional Center as part of the regular incoming mail.

At the time the letters were returned, Senior Correctional Officer Paul D'Auteuil was responsible for opening and inspecting all incoming prisoner mail pursuant to the written procedures of the Maine Correctional Center. Although he does not recall in which order he opened the two letters, he is certain the two letters arrived on the same day, Friday, May 28, 1999.[2] While Officer D'Auteuil does not read the incoming mail, the procedures require that each letter be opened and inspected for cash or contraband. During the course of inspecting the first letter, Exhibit A-1, Officer D'Auteuil saw what appeared to him to be gang symbols. He did not read the letter, but, instead, set it aside because of the gang symbols. Officer D'Auteuil testified that he has not received any training regarding identification of gang symbols. He admitted that his knowledge of gang symbols is limited to what he has seen on television and in movies.

At some point, Officer D'Auteuil made the connection between the first letter and the second letter, Exhibit A-2, in that the letters were written by the same inmate to the same

[2] Because Officer D'Auteuil cannot recall which letter he opened first, the exact manner in which he made the connection between the two letters is impossible to determine. In the end, however, the order in which the letters were opened is of no importance. For convenience, the Court refers to Exhibit A-1 as the first letter because the context of the letters implies that Exhibit A-1 was written first.

addressee. Based on that connection alone, Officer D'Auteuil set aside the second letter with the first letter. Officer D'Auteuil testified that a visual inspection of the second letter alone would not have raised any concerns regarding that letter. The sole basis upon which he set aside the second letter was its connection to the first letter, in that the letters had a common sender and recipient. Officer D'Auteuil indicated that he did not see any gang symbols on the second letter, and he would not have set it aside had he not also seen the first letter.

Again, without having read either letter, that afternoon Officer D'Auteuil placed both letters in their envelopes and slid them under the office door of Corrections Officer Charles Baker, a supervisor in the Security Projects Office of the Maine Correctional Center. Officer D'Auteuil did not attach any notation to the letters indicating why the letters were being referred to Officer Baker, or who had left them there. Officer D'Auteuil testified that referring suspect letters to Officer Baker in this fashion was not uncommon.

On the following Monday, May 31, 1999, Officer Baker discovered the letters in his office. He expected that someone from the mail room had left the letters for him. Officer Baker testified that he opened the first letter, Exhibit A-1, first and scanned it without reading it. Upon scanning the first letter, he saw what appeared to him to be gang symbols. Upon seeing the gang symbols, Officer Baker read the first letter. Subsequently, Officer Baker opened the second letter. Again, he initially scanned the second letter. When scanning the second letter, Officer Baker testified that he again saw what he believed to be gang symbols. On the basis of seeing gang symbols on the second letter, Officer Baker read the second letter. Officer Baker was much more familiar with gang symbols than was Officer D'Auteuil. Officer Baker shared office space with the state coordinator of anti-gang activity. As a result, Officer Baker had reviewed materials prepared for law enforcement officers that display and identify known gang symbols. Two such publications were introduced as Exhibits G-1 and G-2.

At the time the letters were opened and read, the Maine Department of Corrections had written policies and procedures ("the Procedures") regarding the treatment of incoming mail. A

copy of the Procedures was admitted at the evidentiary hearing as Exhibit D-2. Procedure F of Exhibit D-2 reads, in pertinent part, as follows:

> Procedure F. Incoming General Correspondence
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> . . .
>
> 2. All incoming general mail may be opened and examined for cash, checks, money orders or contraband.
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> . . .
>
> 4. Incoming general mail may only be read when there is written authorization from the facility Chief Administrative Officer, and it comes from another prisoner or if there is a reasonable belief that it contains information related to criminal activity, violation of disciplinary rules, or the safety or security of the Department.

Exhibit D-2 at p. 4. At the time the letters were opened and read, it was a violation of the Prisoner Disciplinary Code at the Maine Correctional Center to be "affiliated with, possess[], or display[] any materials, symbols, colors or pictures of any identified gang, or engag[e] in behavior that is uniquely or clearly associated with a gang." Exhibit C at p. 17, ¶ 27.

In reading both letters, Officer Baker concluded that the text of both letters included criminal threats. At some point, the letters were referred to law enforcement officials outside of the Maine Correctional Center, and eventually Maine State Police Special Agent Kenneth MacMaster was tasked with investigating Defendant's conduct.[3] On June 9, 1999, Agent MacMaster traveled to the Maine Correctional Center and interviewed Defendant. The interview was tape recorded, and a transcript of the recording was admitted at the evidentiary hearing as Exhibit B-2. During the course of the interview, Defendant was advised of his *Miranda* rights. Agent MacMaster also acknowledged that he was aware that Defendant was represented by counsel in an unrelated, then ongoing, state prosecution. In response to questions from Agent

[3] Testimony at the evidentiary hearing did not set forth in detail how the letters were referred to law enforcement officials outside of the Maine Correctional Center, and how the matter eventually became the responsibility of Agent MacMaster. However, such details are not particularly relevant to the issues presented by the Motion, and the Court is unaware of any dispute as to these general facts.

MacMaster, Defendant admitted to writing the letters and explained the context in which the letters were written.

II. DISCUSSION

Defendant seeks to suppress both letters on the grounds that they were seized and read in violation of Defendant's Fourth Amendment rights. Additionally, Defendant seeks to suppress Agent MacMaster's interview of Defendant on two distinct legal grounds. First, if either or both of the letters are suppressed, then Defendant contends that the interview must also be suppressed as fruit of the poisonous tree. Alternatively, Defendant argues the interview should be suppressed because it was conducted in violation of his Fifth and Sixth Amendment rights.

While a prisoner's constitutional rights are necessarily limited in certain respects, "[i]t is equally certain that prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S. Ct. 1874, 1878 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84, 107 S. Ct. 2254, 2259 (1987)). An analysis of the constitutional protections afforded prisoners is necessarily distinct from a similar analysis with respect to nonincarcerated individuals. Among other obvious reasons for this distinction is the fact that prison administrators are charged with the safety of all prisoners as well as the correctional staff. To that end, prison administrators must have broad authority to enact rules and procedures to ensure a safe environment within the prison walls. *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878 (1979). The natural result is a clash between the constitutional rights of prisoners and the compelling need of the prison administrators to promote safety. Accordingly, the Supreme Court has recognized that the constitutional rights of prisoners must be evaluated in light of the "inordinately difficult undertaking that is modern prison administration." *Abbott*, 490 U.S. at 407, 109 S. Ct. at 1878 (quoting *Turner*, 482 U.S. at 85, 107 S. Ct. at 2259).

A prisoner's right to receive mail that has not been read is one circumstance illustrating the friction between the constitutional rights of prisoners and the responsibilities of prison

administrators. Incoming prison mail is a potential conduit for all types of contraband detrimental to prison security. Yet it is reasonable for prisoners to have some legitimate expectation of privacy in communications by mail. In an effort to balance these concerns, most prisons have adopted standards and procedures for handling incoming and outgoing inmate mail. The Procedures adopted by the Maine Correctional Center are consistent – at least in relevant part – with both the Boston University Center for Criminal Justice Model Rules and Regulations on Prisoners' Rights and Responsibilities and the National Advisory Commission on Criminal Justice Standards and Goals for Corrections, in that all three permit incoming mail be opened and inspected for contraband, but not read. Wayne R. LaFave, Search and Seizure § 10.9(c), n.86 (3rd ed. 1996). Couched in terms of *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), the Procedures create in prisoners at the Maine Correctional Center a legitimate expectation of privacy. In other words, prisoners at the Maine Correctional Center may legitimately expect that their incoming mail will only be read if certain conditions set forth in the Procedures are met.

In essence, the Government concedes that the Procedures establish the bounds of Defendant's legitimate expectation of privacy under the Fourth Amendment. Indeed, the Government relies on the Procedures in support of its argument that Defendant had no legitimate expectation that his mail would not be opened and inspected. This is true, the Government contends, because the Procedures expressly provide for the opening and inspection of all mail, without cause, to inspect for contraband. But if, as the Government concedes and this Court holds, the Procedures constitute the limits of Defendant's legitimate expectation of privacy, it necessarily follows that the failure to comply with the Procedures constitutes a violation of Defendant's legitimate expectation of privacy.[4]

[4] To hold otherwise would be illogical. A court's constitutional validation of prison procedures that have the potential to impinge on prisoner's fundamental rights, necessarily implies that a substantial deviation by prison officials from those procedures represents a violation of the prisoner's constitutional rights.

Turning now to the application of the Procedures to these letters, as a threshold matter, the Court rejects any of Defendant's arguments that are predicated on a factual determination that the letters should be treated as outgoing mail rather than incoming mail. The procedures for handling outgoing mail at the Maine Correctional Center are markedly different from the procedures for handling incoming mail. Despite the fact that these letters were originally outgoing mail – when Defendant attempted to mail them to Mike Wilson – when the United States Postal Service returned the letters as undeliverable, Officer D'Auteuil treated the letters as incoming mail. Officer D'Auteuil testified that the Maine Correctional Center regularly receives returned, undeliverable mail, and it is always treated as incoming mail. Such a practice is entirely reasonable. Accordingly, the Court rejects those of Defendant's arguments which rely on a proposed finding that the letters should have been treated as outgoing mail when they were returned to the Maine Correctional Center by the United States Postal Service.

Furthermore, the Court holds that the Procedures are facially valid. The Procedures demonstrate a reasonable effort on the part of the State of Maine to balance the privacy rights of prisoners with the legitimate penological interests of "safety, order, and rehabilitation." *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811 (1974); *Turner*, 482 U.S. at 87, 89, 107 S. Ct. at 2260-62 (regulation that impinges on prisoners' constitutional rights will be upheld if "reasonably related to legitimate penological objectives.").

As previously discussed, the Court accepts Defendant's contention that the contours of his legitimate expectation of privacy are to be found in the Maine Correctional Center's Procedures. Defendant contends that the Procedures permit him to reasonably expect that his mail will not be read by corrections officers unless certain circumstances warrant. Defendant argues that the letters were read by Officer Baker in violation of the written policies and procedures, rendering it a violation of Defendant's legitimate expectation of privacy.[5]

[5] To the extent that Defendant contends that his legitimate expectation of privacy was (continued...)

Accordingly, Defendant avers, reading the letters constituted a violation of Defendant's Fourth Amendment rights, which in turn requires that the letters be suppressed.

At the heart of Defendant's argument is that neither letter contains what can reasonably be characterized as gang symbols.[6] With respect to the first letter, the Court is satisfied that it was reasonable for Officer Baker to conclude, based on an inspection and without reading the letter, that it contained gang symbols. The first letter, Exhibit A-1, is a three-page handwritten letter. The third page of the first letter includes four lines of text at the top of the page. The remaining three-quarters of the page is filled with symbols and images. When Officer Baker examined – without reading – the first letter, he testified that he recognized many of the symbols and images to be similar to known gang symbols he had seen in law enforcement publications.[7]

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[5](...continued)
violated when either of the letters were opened and inspected – but not read – the Court rejects this argument. As the Court has already established, the Procedures properly allow all incoming mail to be opened and inspected for contraband. Accordingly, Defendant cannot have a legitimate expectation that his incoming mail will not be opened and inspected.

[6] By this argument, the Court understands Defendant to concede that if a corrections officer viewed what he believed to be gang symbols during the course of inspecting a letter, then the corrections officer could properly read the letter in accordance with the Procedures.

[7] Defendant makes much of Officer D'Auteuil's lack of training with respect to recognizing gang symbols. Officer D'Auteuil readily admitted that he has never been trained to recognize gang symbols and that he could identify the images on the first letter as gang related based only on what he had seen in television shows and movies. But because Officer D'Auteuil never read either of the two letters, the Court need not explore the reasonableness of his activities. As the Court has already explained, Defendant had no legitimate expectation that his letters would not be opened – only that they would not be read except under certain circumstances.

The reasonableness of Officer D'Auteuil's actions could be relevant if Officer Baker had relied on Officer D'Auteuil's conclusions regarding the presence of gang symbols. Officer Baker testified, however, that he scanned both letters without knowing why they had been forwarded to him. In essence, Officer Baker conducted an independent inspection of the letters. While it is true that Officer D'Auteuil brought the letters to Officer Baker's attention, nothing from the evidentiary hearing indicates that Officer D'Auteuil's belief that the first letter contained gang symbols was known or even suggested to Officer Baker. Indeed, given that both officers testified that there was very little, if any, known gang activity in the Maine Correctional Center, it is improbable that Officer Baker inferred – prior to inspecting them – that the letters referred to him contained gang symbols. Because Officer Baker read the letters, and Officer D'Auteuil did not, only Officer Baker could have violated Defendant's legitimate expectation that the letters not

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For example, during the hearing, Officer Baker testified that he recognized the five-pointed crown that appears at the bottom of page three of the first letter (Exhibit A-1) as being consistent with symbols affiliated with the "Latin Kings" gang. In particular, Officer Baker noted that the crown in the first letter was very similar to the symbols associated with the Latin Kings seen on pages 108 and 109 of Exhibit G-1 and page 132 of Exhibit G-2. Upon comparing the crown in the first letter with the crowns displayed in the law enforcement publications regarding gang activity, the Court is satisfied that Officer Baker's conclusion that the first letter contained gang symbols was reasonable.[8] Accordingly, when Officer Baker read the first letter, he did not violate Defendant's legitimate expectation of privacy in the first letter. Seeing what he reasonably believed to be gang symbols, Officer Baker was entitled to read the first letter pursuant to the Procedures of the Maine Correctional Center.

As Defendant properly points out in his brief, however, Defendant enjoys a distinct expectation of privacy with respect to each of the two letters. Accordingly, the Court will now examine the basis upon which Officer Baker read the second letter, Exhibit A-2. The second letter is also three handwritten pages. But unlike the first letter, the second letter includes no obvious symbols or images, aside from normal letters and numbers. As with the first letter, Officer Baker testified that he removed the second letter from its envelope, inspected it without reading it, and only after seeing what he believed to be gang symbols did he read the second

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[7](...continued)
be read unless certain circumstances set forth in the Procedures were met. Accordingly, the Court will focus on the reasonableness of Officer Baker's conduct.

[8] Defendant's attempt to characterize the crown and the other symbols on the first letter as symbols of "hip-hop culture" with no relationship to gangs is unpersuasive. While it is apparently true that the five-pointed crown is a symbol of the hip-hop movement, that does not change the fact that the five-pointed crown is also associated with the Latin Kings gang. Nearly every symbol associated with gangs displayed in Exhibits G-1 and G-2, has innumerable recognized nongang meanings. Assuming it to be true that Defendant, in drawing the five-pointed crown that appears on the first letter, had no subjective intent to make reference to the Latin Kings is irrelevant to the task currently before the Court. What is relevant is the basis upon which Officer Baker read each of the letters.

letter. When pressed to identify what he discerned to be gang symbols on the second letter, Officer Baker testified that what he believes are the characters "K5" and "OGC 120" that appear on the bottom of the last page of the letter could have been gang symbols. Officer Baker thought that "K5" could be a reference to the Latin Kings gang, but he could not point to any published authority indicating that "K5" is a Latin Kings reference or symbol. Officer Baker could not explain why he believed "OGC 120" was a gang symbol.

The Court does not find Officer Baker's stated basis for reading the second letter to be reasonable. Specifically, the Court finds unreasonable Officer Baker's conclusion that the second letter contained gang symbols. With respect to both letters, Officer Baker testified that he saw what appeared to be gang symbols while scanning – without reading – both letters. During the course of scanning the first letter, it would be difficult not to see the numerous symbols and images on the last page, as they stand in stark contrast to the written text on the first two pages of the first letter. There are no such symbols or images anywhere on the second letter. The "K5" and "OGC 120" are only slightly larger text than the text found in the body of the letter. Indeed, the "K5" and "OGC 120" appear centered under the end of the text in a manner that strongly suggest that they are a signature.

The policies and procedures of the Maine Correctional Center create a legitimate expectation of privacy by Defendant that his incoming mail will not be read unless certain circumstances arise. Officer Baker testified that he read the second letter because his examination of that letter revealed what he believed to be gang symbol. Because gang symbols and gang activity are prohibited, Officer Baker concluded the Procedures permitted him to read the letter. The Court finds Officer Baker's conclusion that the second letter contained gang symbols to be unreasonable.[9] Accordingly, Officer Baker violated Defendant's legitimate

[9] Although by no means the basis of the Court's conclusion on this point, the Court notes that Officer D'Auteuil testified that he did not see anything suspicious on the second letter, and if the second letter did not have the same sender and recipient as the first letter, he would not have

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expectation of privacy when Officer Baker read the second letter. Therefore, the Court will suppress the second letter on the grounds that it was read in violation of Defendant's Fourth Amendment rights. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1984).

Turning now to the interview of Defendant by Agent MacMaster, the Court begins by rejecting Defendant's efforts to suppress the interview on the grounds that his Sixth Amendment right to counsel was violated. Although not pressed in his brief, by his Motion, Defendant alleged that because he was represented by counsel in an entirely unrelated criminal matter, Agent MacMaster, knowing Defendant had an attorney, should not have interviewed Defendant without his attorney present. That argument is contrary to the Supreme Court's holding in *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204 (1991), and the Court therefore rejects it.

Alternatively, Defendant contends that if either or both of the letters are suppressed, then the interview must also be suppressed as fruit of the poisonous tree. Because during the course of the interview, Defendant admitted that he wrote the letters and explained why he wrote the letters, the Court will treat his statements as a confession. Agent MacMaster testified that his only basis for conducting the interview was his knowledge of both letters. Additionally, the interview transcript reveals that Defendant was hesitant to answer questions about the letters before Agent MacMaster produced the letters. It was only after Defendant reviewed the letters during the interview that Defendant admitted he wrote the letters and explained why they were written. Exhibit B-2 at pp. 4-6.

Although apparently not squarely decided by the Supreme Court, it is well settled that a confession that is the product of the fruits of an illegal search should be suppressed under the fruit of the poisonous tree doctrine. *McCloud v. Bounds*, 474 F.2d 968, 971 (4th Cir. 1973); *U.S. v. Nafzger*, 965 F.2d 213, 217 (7th Cir. 1992); *cf. Wong Sun*, 371 U.S. at 484-86, 83 S. Ct. at 415-16 (statements made by defendant to law enforcement officers during the course of an illegal

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[9](...continued)
set the second letter aside for further attention.

entry and search of his apartment not admissible). The logic of such a rule is plain. When presented with irrefutable evidence of the crime, a suspect is far more likely to confess, as the futility of silence has been revealed. Were this not the rule, police would have an incentive to obtain evidence illegally, hoping to produce a confession that would survive despite later suppression of the evidence that generated the confession.

Finally, as Defendant correctly argues, it would be impossible to effectively redact the interview transcript such that only those portions that refer to only the first letter remain. Much of the interview is spent discussing the letters together, and the incriminating statements by Defendant plainly refer to both letters.[10] The only feasible remedy is to suppress the entire interview as the fruit of the poisonous tree – specifically, the improper search of the second letter.[11]

[10] For example, on page 5 of Exhibit B-2, after reading both letters, Defendant stated "I wrote that, I wrote both of those letters." Shortly thereafter, Defendant provides lengthy answers to two questions from Agent MacMaster that reference both letters. Specifically, Agent MacMaster asked "Okay. So, what was up with writing both the letters?" and "They're pretty threatening." Exhibit B-2 at pp. 5-6. It is not possible to redact the interview in a way that reflects the fact that only the second letter has been suppressed.

[11] The Government has not provided the Court with any argument in response to Defendant's poisonous tree theory except to conclude that because the letters should not be suppressed, there is no reason to suppress the interview. The Government has not offered any legal argument or authority for the proposition that the interview transcript should be redacted in light of the fact that the Court has determined that one of the letters must be suppressed.

III. CONCLUSION

Accordingly, it is **ORDERED** that Defendant's Motion to Suppress be, and it is hereby, **GRANTED** in part and **DENIED** in part. It is further **ORDERED** that the second letter, Exhibit A-2, and any statements of admission or confessions made by Defendant in the course of the interview of Defendant be, and they are hereby, **SUPPRESSED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 19th day of April, 2000.

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USA v. O'ROURKE                                          Filed: 08/10/99
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